



Land Use Moratoria

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Two types of moratoria

1. Land use
2. General police power

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Land use moratorium

- Local law or ordinance
 - Temporarily suspends landowner's right to obtain development approval(s)
 - Address circumstances not addressed by current laws
- Community considers revisions
 - Comprehensive plan; and/or
 - Land use regulations



Landmark moratorium case

“Otherwise, any movement by the governing body of a city to zone would, no doubt, frequently precipitate a race of diligence between property owners, and the adoption later of the zoning ordinance would in many instances be without effect to protect residential communities – like locking the stable after the horse is stolen.”

- Downham v. Alexandria, 58 F.2d 784 (D.C. Va., 1932)

General Police Power moratorium

Non-zoning moratoria are temporary restrictions imposed by municipality under general police power in response to immediate health & safety problem

Municipality must justify such temporary measures:

- It acted in response to dire necessity
- Its action is reasonably calculated to alleviate or prevent crisis condition
- It is presently taking steps to rectify the problem

Crisis prevention

“... the municipality must establish that it has acted in response to a dire necessity, that its action is reasonably calculated to alleviate or prevent the crisis condition, and that it is presently taking steps to rectify the problem.”

- Belle Harbor Realty Corp. v. Kerr, 35 N.Y.2d 507 (1974)

Moratoria prevents

- Rushed development
- Inefficient & ill-conceived growth
- Hasty decisions that might result in disadvantages to landowners & the public
- Immediate construction inconsistent with comprehensive plan



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Impermissible reasons

- Slow down development in hopes that developer will go away
- Halt development while community considers buying land
 - Oakwood Island Yacht Club v. City of New Rochelle, 59 Misc.2d 355 (Sup. Ct. Westchester Co. 1955), aff'd. 36 A.D.2d 796 (2d Dept. 1971), aff'd. 29 N.Y.2d 704 (1971)

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“Growth-Capping” laws

- Designed to limit not halt development pending capital improvement upgrades
- Moratorium, by contrast, is designed to halt development for a certain period, to maintain the status quo

Assures
development
doesn't outpace
planned
improvements

Possible approvals affected

- New land use applications
- Projects currently before review boards
- Issuance of permits
 - Building, sign, water & sewer connection
- Establishment of certain businesses
 - Adult use, junkyards, mining, etc.
- Siting of certain uses
 - Solid waste facility, etc.



Possible exemptions

Moratoria often exempt certain activities, such as:

- Construction applications that have been approved & begun, even where rights have not vested
- Construction of single-family homes
- Minor expansions or additions to buildings, such as garages for residences
- Projects under review, such as subdivision applications which have received preliminary approval

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Subdivisions

- Default approval
 - If board fails to take action within statutorily prescribed time frames
- Moratorium suspends subdivision applications and may delay action beyond time frames
- Moratorium should state that it supersedes default approval provision
 - Specify exact provision

- Town Law §276(8)
- Village Law §7-728(8)
- General City Law §32(8)

Turnpike Woods, Inc. v. Tn of Stony Point, 70 N.Y.2d 735 (1987)

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Use variances

Municipality undertaking rezoning may enact moratorium on granting of use variances by Zoning Board of Appeals (ZBA) even though local law would be inconsistent with general law

- Attorney General Inf. Opinion 87-22

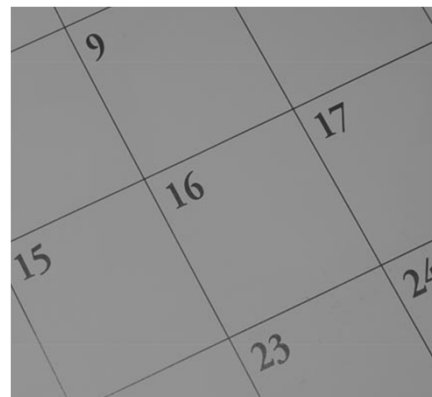
**Make Laws
Legally Defensible**

5 Key elements

1. Reasonable time frame relative to action being addressed
2. Valid public purpose
3. Address situation where burden imposed is shared substantially by public at large
4. Strict adherence to statutory adoption procedures
5. Certain expiration time

1. Reasonable time frame

- Must be relatively short
 - Not excessively long or unfixed
 - Specify duration
 - Relate closely to actions necessary to address the issues
- Municipality must actively engage in planning or developing regulations
 - Rubin v. McAlevey (see above); and Lake Illyria Corp. v. Tn of Gardiner, 43 A.D.2d 386 (3d Dept. 1974)



Struck Down – Too Long

- 7 years: Comprehensive plan & draft zoning
 - Lakeview Apartments v. Town of Stanford
- 5 years: Local Waterfront Revitalization Program
 - Duke v. Town of Huntington
- 5 years: Draft new zoning law & master plan
 - Mitchell v. Kemp

Upheld – Reasonable Duration

- 2 Year: Wind energy projects
 - Variance
 - 90-day extension
 - Highly technical nature
 - Ecogen, LLC v. Town of Italy
- 1 year: Adjust zoning related to big box development
 - Village of Rockville Center

2. Valid public purpose

Local law should state purpose(s) for adopting moratoria, such as:

- Town facing unprecedented growth & development following announcement of chip fabrication plant
- Zoning does not include renewable energy facilities
- Town is waiting for environmental study results

2. Valid public purpose

- Time is need to develop or amend:
 - Comprehensive plan
 - Zoning regulations
 - Subdivision regulations
 - Site plan regulations
 - Other land use regulations
- Make improvements to:
 - Road system
 - Water or sewer infrastructure



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3. Balance community benefit/detriment

- Burden must be shared by the municipality at large – not a small subset
- Advantages to the municipality must outweigh potential hardships to landowners



Charles v. Diamond
41 N.Y.2d 318, 326 (1977)

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4. Strict adherence to procedures

Cite one of these two sources of authorization; follow procedures

1. Local law adoption under General Police Power
 - Municipal Home Rule Law § 20–27
2. Amend zoning by local law or ordinance
 - Town Law § 263-265
 - Village Law § 7-706 & 7-708
 - City Charter

5. Time certain for expiration

- Duration cannot be unreasonable.
- If no indication when moratorium will end, courts can inquire as to the constitutionality of moratorium and set time certain

Russo v. New York State Department of Environmental Conservation,
55 A.D.2d 935 (N.Y. App. Div. 1977)

Variations from the moratorium

Variance applications from interim zoning ordinance must meet the same statutory standards for variances as though the interim zoning was permanent

- During moratorium, it's common for governing board--rather than ZBA--to consider variances
- Moratorium law must specifically state supersession of statute if governing board will consider variances instead of ZBA

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Variance standards

Court held that adult community should get a variance:

- Extraordinary hardship
- No adverse impact health, safety & general welfare
- Not substantially undermine land use plan & revision process under review

- Town Law §§267, 267-a & 267-b
- Village Law §§7-712, 7-712-a & 7-712-b
- General City Law §§81, 81-a, & 81-b

Montgomery Group, LLC v. Town of Montgomery, 4 A.D.3d 458 (2d Dept. 2004)

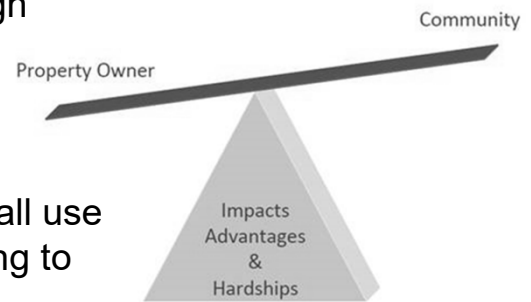
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Takings

- Advantages to municipality must outweigh potential hardships to landowners
 - Charles v. Diamond, 41 N.Y.2d 318 (1977)
- Temporary takings that deny landowner all use of their property are permissible according to the U.S. Supreme Court
 - Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002)



Vested rights

- The right to build or use property according to law as it existed prior to effective date of moratorium if landowner has undertaken substantial construction & made substantial expenditures
 - Ellington Construction Corp. v. ZBA of the Incorporated Village of New Hempstead, 77 N.Y.2d 114 (1990)
- Obtaining vested rights essentially makes use under construction legal non-conforming use

Vested rights

- Moratoria may not be used to stop building operations begun under a valid building permit and which continued in good faith to the extent that property owner had secured vested rights
 - Hasco Electric Corp. v. Dassler, 143 N.Y.S.2d 240 (1955)
- Valid building operations may not be stopped in anticipation of a moratorium in order to prevent landowner from qualifying for vested rights
 - Temkin v. Karageuzoff, 43 A.D.2d 820 (1st Dept. 1974)

Refer to county planning

If moratorium acts as an amendment to zoning, then it must be referred to the county planning agency

B & L Development v. Tn of Greenfield, 146 Misc.2d 638 (Sup. Ct. Saratoga Co. 1990)

Court invalidated a one-year moratorium on building permits & construction approvals because town did not follow procedural requirements for amending zoning. Court held that moratorium law was subject to all statutory procedural requisites of zoning laws, including county referral (GML § 239-m) & notification of adjacent municipalities pursuant to Town Law § 264.

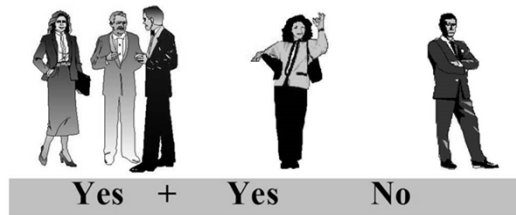
Caruso v. Tn of Oyster Bay, 250 A.D.2d 639 (2d Dept. 1998)

Court held town board had no jurisdiction to adopt a local law establishing a moratorium on building permits for new home construction in a defined area of town since it had failed to properly refer law to county planning commission (GML § 239-m).

County planning may affect vote

- If County Planning Agency recommends proposed zoning moratorium be:

- Disapproved
- Approved with modification



- Governing board may act contrary but only by supermajority vote

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SEQRA

State Environmental Quality Review Act (SEQRA) classifies Moratoria as Type II Actions

- Type II Actions have been determined not to have a significant impact on environment
- Once classified, they require no further review under SEQRA
 - Make notation in file

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Drafting a moratorium law

- Adopt in the form of a local law
- For existing zoning ordinance or local law, treat as an amendment to that ordinance or local law
- Clearly define the activity affected
- If moratorium supersedes any provision of Town or Village law, then it must be adopted by Municipal Home Rule Law and also specifically state section being superseded

Drafting a moratorium law (con't)

- Establish a valid public purpose for the moratorium with a preamble that recites the nature of the land use issue
- Be sure to state that moratorium is in effect for a specific time period
- Include a relief mechanism

Conclusion

- With community growth comes development pressure
 - Comp plans should ideally be adequate to deal with growth, but local officials are often caught by surprise
- Moratoria provide time to formulate a comprehensive regulatory approach
- Precisely drafted moratoria should withstand legal challenges

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